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Judicial approval of the creation of two tentative plaintiff classes for the settlement of a series of individual and class actions known as the "plumbing fixture" cases[1] raises the possibility that tentative settlement classes may be used in other types of class actions. The plumbing fixture cases involved over three hundred actions by builder-owners, public bodies, wholesalers, retailers, and plumbing and general contractors who alleged that the defendants violated antitrust laws with respect to the manufacture and sale of plumbing fixtures. After a great deal of litigation[2] two proposed settlements were reached, each providing for the establishment of a temporary class for the purpose of settlement only.[3] The settlements were conditionally approved, and over 243,000 individuals were sent notice.[4] At the final hearing, the temporary settlement class was designated final and permanent, and the proposed compromise was given judicial endorsement.[5]

This Note will examine the potential utility of a tentative settlement class (TSC) in suits initiated under title VII of the Civil Rights Act of 1964. The advantages and disadvantages of the TSC will be discussed in the context of analyzing whether the use of a TSC is valid under rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. The discussion of the merits of the TSC in the title VII context will illustrate the problems inherent in the use of a tentative class for encouraging settlements of any class action.

The enactment of title VII of the 1964 Civil Rights Act[6] made it illegal to discriminate with respect to employment on the basis of an individual's race, color, religion, sex, or national origin. As originally

1. Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 322 F. Supp. 834 (E.D. Pa. 1971); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364 (E.D. Pa. 1970).

2. *See* cases cited in note 1 *supra*. Other opinions dealing with various aspects of the litigation are reported at 50 F.R.D. 13 (E.D. Pa. 1970); 309 F. Supp. 1057 (E.D. Pa. 1969); 294 F. Supp. 1148 (E.D. Pa. 1969); 291 F. Supp. 252 (E.D. Pa. 1968); 269 F. Supp. 540 (E.D. Pa. 1967). Indeed, over three hundred actions were pending at the time of the compromise. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 365 (E.D. Pa. 1970).

3. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 372 (E.D. Pa. 1970). Settlement Order Number One provided for the establishment of a national temporary class of wholesalers with claims against the settling defendants. A second compromise created a national class of plumbing and general contractors. 323 F. Supp. at 366, 372.

4. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 322 F. Supp. 834, 836 (E.D. Pa. 1971).

5. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 322 F. Supp. 834, 840 (E.D. Pa. 1971).

6. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-15 (Supp. II, 1972)).

structured, the Act contemplated that charges of unlawful discrimination in employment would be filed with the Equal Employment Opportunities Commission (hereinafter referred to as the EEOC), the agency established to implement the prohibitions of the Act.[7] Upon the filing of a charge the Commission was to conduct an investigation to determine whether there was reasonable cause to believe that the charge was true. If reasonable cause was found, the EEOC was under a duty to attempt to eliminate the unlawful practice through informal conciliation and persuasion.[8] If the EEOC failed to conciliate, the individual could file suit on his own.[9]

Unfortunately, this scheme did not accomplish effectively the aims of the Act. Private parties frequently failed to bring actions in the courts after the EEOC had been unable to obtain a voluntary settlement[10] and, as a result, there was insufficient pressure on employers to settle disputes.[11]

The passage of the Equal Employment Opportunity Act of 1972[12] broadened considerably the authority of the Commission to obtain corrective action in eliminating discrimination. The EEOC was given power to initiate civil actions in federal court.[13] Thus, under present law, once charges are filed with the EEOC, the agency may (1) dismiss the charges if it finds no reasonable cause to believe them, (2) fail to act for a period of 180 days, (3) find reasonable cause and institute suit,[14] or (4) reach a conciliation.[15] If the agency dismisses the charges

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7. Civil Rights Act of 1964 § 706(a), 42 U.S.C. § 2000e-5 (1970), *as amended*, 42 U.S.C. § 2000e-5 (Supp. II, 1972).

8. Civil Rights Act of 1964 § 706(b), 42 U.S.C. § 2000e-5(b) (1970), *as amended*, 42 U.S.C. § 2000e-5 (Supp. II, 1972).

9. Civil Rights Act of 1964 § 707, 42 U.S.C. § 2000e-5 (1970), *as amended*, 42 U.S.C. § 2000e-5 (Supp. II, 1972).

10. *See Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. 38, 40 (1969).

William H. Brown III, chairman of the EEOC, noted that private suits had been initiated in less than ten per cent of those cases in which the EEOC had been unable to obtain voluntary settlement. *Id.*

11. For example, in fiscal year 1972, the last fiscal year before the implementation of the 1972 amendments, the EEOC found reasonable cause to assert unlawful discrimination against 1,390 employers. Settlement was attempted with respect to 792 of these employers; only 268 complete or partial successes were recorded. 7 EEOC ANN. REP. 52-53 (1973). *Cf.* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 80 (1966): "The experience of state and local agencies shows that impotence will frequently be met with intransigence, that conciliation works best when compulsion is waiting in the wings."

12. 42 U.S.C. § 2000e to 2000e-15 (Supp. II, 1972), *amending* 42 U.S.C. § 2000e to § 2000e-5 (1970).

13. Civil Rights Act of 1964 § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

14. It is not clear whether the EEOC's right to sue on a charge expires 180 days after the charge is filed. The Fourth Circuit, the only court of appeals that has ruled on the question, recently held that it does not. EEOC v. Cleveland Mills, excerpted in 43 U.S.L.W. 2092 (Sept. 10, 1974).

15. Civil Rights Act of 1964 § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972). In cases involving a state law that parallels the federal law, the EEOC will defer

or fails to act for 180 days, the private party may institute suit on his own.[16]

Even under the 1972 amendments potential defendants may not have sufficient incentive to resolve title VII complaints quickly. A judgment, and even litigation, may still be years away,[17] particularly where the discrimination is not blatant, or when there are interpretive difficulties surrounding the act. Thus, despite the necessary step instituted by the 1972 amendments, speedy resolution of employment discrimination problems is not yet a reality.

The tentative settlement class may present a useful alternative in situations in which private class actions may be maintained.[18] The TSC differs from the class in a class action suit primarily in matters of timing. Whereas the usual class must be formed and approved by the court before the suit may proceed as a class action,[19] the TSC is formed without judicial scrutiny at the same time that the parties institute settlement negotiations. The court is then asked to approve a "package" consisting of the TSC and of the proposed settlement.[20] The TSC is "tentative" in the sense that the employer has the right to object to its breadth in the event that the court does not approve the settlement. The class in a more typical class action offers no such flexibility; the parties are bound by the class determination once the suit is allowed to proceed as a class action. The TSC also permits a broadening of the plaintiff class so that the potential claims of all employees of the defendant-employer are represented, including

to the state proceeding for 60 days after the initial complaint. 42 U.S.C. § 2000e-5(d) (Supp. II, 1972). *See also* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 863-64 (1972).

16. 42 U.S.C. § 2000e-5(f) (Supp. II, 1972).

17. The EEOC suffers from a considerable work backlog. For example, as of June 30, 1971, 32,000 cases were backlogged. Processing a case may require 18 to 24 months. *Hearings on S. 2515, S. 2617, and H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 55 (1971). After the EEOC finds reasonable cause another 6 months usually has passed before it seeks conciliation. 118 CONG. REC. S.1800 (daily ed. Feb. 15, 1972) (remarks of Senator Javits). Court delay may add another 18 months or more. *Id.*

18. *See* text accompanying note 16 *supra*.

An analogous all party settlement procedure could be incorporated into EEOC settlement negotiations, but many of the advantages of the procedure are lost once it is placed within the EEOC framework. The settlement may not foreclose other parties from bringing suit over the same employment practice, Reed v. Arlington Hotel Co., 476 F.2d 721, 724-25 (8th Cir. 1973), *cert. denied*, 414 U.S. 854 (1973); Williams v. New Orleans S.S. Assn., 341 F. Supp. 613 (E.D. La. 1972), and the possibility of speedy settlement would be diminished by overworked bureaucratic structures.

19. FED. R. CIV. P. 23(c)(1) (*see* text preceding note 94 *infra*); 1 (Pt. 2) J. MOORE, FEDERAL PRACTICE ¶ 1.40 (pt. 1) (2d ed. 1973).

20. Court approval of class action settlements is required by FED. R. CIV. P. 23(e): "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

claims not included in the original complaint. The employer seeks an all-encompassing class because he desires one lump settlement that will free him from the possibility of additional claims.

Procedurally, the TSC would be formed after the filing of suit,[21] upon the defendant's motion that all employees with potential title VII claims be included in any settlement discussion.[22] The suit, however, would remain under the control of the original plaintiffs. The parties would negotiate a final settlement package that would include an amendment of the pending suit to encompass the broadest possible spectrum of interested parties. For example, a class might be composed of all members of racial or ethnic minorities, including but not limited to black, Spanish-surnamed, Oriental, and Indian Americans who have been employed, are employed, or may be employed by the defendant at *ABC* plant, and who have been, are presently, or may in the future be adversely affected by past or present employment practices of the defendant that discriminated on the basis of race, color, or national origin.[23]

The package would also require that all prior actions based on the alleged discrimination, including any charges pending before the EEOC, be dropped if the settlement is approved. In addition, the plaintiffs would agree not to file new actions based on past employer conduct.[24] Finally, the defendant would not admit liability. The mere fact that the defendant offers to settle cannot be used against him as evidence of an admission of liability.[25]

After the agreement is consummated the requisite notice[26] would be sent to all members of the prospective class, describing the litigation, the defendants, and the composition of the proposed class. Recipients would be advised of the final approval date[27] and warned that they may be bound by the terms of the agreement.

21. The TSC could be formed at any stage of the settlement process, but the employer's incentive to agree to or initiate the TSC is significantly greater when a court suit is imminent. The most likely time for TSC formation is after the EEOC dismissal or failure to act, at which time the employee(s) will have instituted or will be contemplating court action.

22. This discussion presupposes that the employer can be induced to settle out of court. Any settlement, incorporating a TSC or otherwise, may be made impossible by the employer who insists on lengthy and costly court battles. The employer incentive to negotiate a TSC is discussed in the text accompanying notes 28-32 *infra*.

23. As noted above, this class would be created for the purpose of settlement only, and without prejudice to a de novo class determination in future litigation if the settlement or the class is not approved by the court.

24. Also, judicial approval of the settlement is res judicata as to those claims settled. *See* Stevenson v. International Paper Co., 352 F. Supp. 230 (S.D. Ala. 1972) (decisions issued in a prior class action held to bar any new decision on those same issues in a suit against a paper manufacturer for alleged discrimination).

25. C. McCormick, Handbook of the Law of Evidence § 274 (2d ed. 1972).

26. Notice is required under Fed. R. Civ. P. 23(e).

27. The approval date would be the date set by the court for a hearing to determine whether the settlement will be approved. *Cf.* Fed. R. Civ. P. 23(c)(2)(A);

The strength of the tentative settlement class proposal rests with the increased incentive to the defendant to settle quickly. The TSC has its greatest potential where private claims are pending and the defendant-employer fears the filing of other claims. As a quid pro quo for settling all actual and potential claims the defendant-employer is assured that he faces no further liability. The defendant, however, must believe that the total cost of the compromise will be significantly less than the total cost of litigating all the claims made by all actual and potential plaintiffs. Such a belief might be well-founded. Civil rights litigation is costly;[28] even ten years ago the cost of a trial in a federal district court with an appeal to a circuit court of appeals and an application to the Supreme Court was estimated at from 15,000 to 18,000 dollars.[29] Moreover, the defendant faces the risk of being forced to pay the plaintiff's attorney's fees,[30] which can be quite sizeable.[31] To the anticipated litigation costs must be added the value of all claims discounted by what the defendant believes to be his probability of prevailing in court. This total is the base figure for the TSC agreement. The employer benefits to the extent that the settlement figure is lower.

Another advantage for the employer is that he will be able to ascertain at an early stage the total extent of his liability. He benefits from a greater cost accounting certainty, which will ease his budgeting tasks, and his business is freed from the potential loss of reputation and clientele that may accompany a long series of discrimination suits.

Finally, the defendant's litigation posture has not been damaged if the final settlement is not approved, provided the court upholds the provision of the agreement under which the defendant is entitled to de novo consideration of the breadth of the class.[32]

Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 322 F. Supp. 834, 836 (E.D. Pa. 1971).

28. Comment, *Allowance of Attorney Fees in Civil Rights Actions*, 7 COLUM. J. L. & SOC. PROB. 381, 381 (1971).

29. 110 CONG. REC. 6541 (1964) (remarks of Senator Humphrey).

30. Civil Rights Act of 1964 § 706(k), 42 U.S.C. § 2000e-6k (Supp. II, 1972).

31. *See, e.g.*, Clark v. American Marine Corp., 320 F. Supp. 709 (E.D. La. 1970), *aff'd. per curiam*, 437 F.2d 959 (5th Cir. 1971), where attorney's fees of $20,000 were awarded to the plaintiffs. EEOC court action, it should be noted, does not result in an award of attorney's fees to the plaintiffs unless they choose to intervene in the EEOC action. Civil Rights Act of 1964 §§ 706(k), (f)(1), 42 U.S.C. §§ 2000e-6(k), (f)(1) (Supp. II, 1972).

32. *Compare* the "plumbing fixture cases," discussed in notes 1-2 *supra* and accompanying text, *with* West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971). In *Pfizer*, 66 civil actions were filed claiming violations of antitrust laws in connection with the sale of antibiotics. A settlement was reached and an order filed to administer the settlement. The plaintiffs were divided by the order into two groups: (1) governmental bodies and (2) wholesalers and retailers. 314 F. Supp. at 723. For the governmental bodies a "temporary national class action" was established. A member could accept the offer of settlement by joining the national class,

The use of a tentative settlement class also aids the implementation of the Civil Rights Act in that expeditious settlements effectuating changes in employment practices further the EEOC's goal of restructuring employment policies that adversely affect large numbers of people.[33] Settlement of title VII cases, however, may hinder development of the law in the area. There is evidence that Congress authorized private litigation to encourage the judicial enunciation of principles on employment practices as well as to facilitate the compensation of aggrieved parties.[34]

Courts generally favor settlement over litigation,[35] however, if the settlement is "fair, reasonable, and adequate."[36] Court resources, which have come under increasing strain,[37] are freed. Furthermore, settlement allows plaintiffs to receive payment without years of expensive litigation. Previous experience reveals that without assistance many plaintiffs fail to pursue their discrimination claims.[38] Although the provisions allowing awards of attorney's fees[39] and authorizing the EEOC to bring court actions[40] increase the likelihood that redress will be sought, the tentative settlement class may avoid long litigation delays and the uncertainty of recovery,[41] and thus increase the incentive for plaintiff action.

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exclude himself from the national class but accept the settlement offer, or reject the settlement offer and exclude himself from the national class. 314 F. Supp. at 723. The private wholesalers and retailers who accepted the settlement offer combined their claims into a "consolidated wholesaler-retailer class action." 314 F. Supp. at 724. The class was established prior to court consideration of the adequacy of the compromise. In the plumbing fixture cases, however, the class determination hinged on a final approval of the settlement. There is little difference if the settlement is consummated and the compromise approved. If the court does not approve the compromise, however, the *Pfizer* procedure would leave the employer-defendant with a very broad class action suit to contest. Arguments on the extent of the injury and on the proper size of the class may be irrevocably sacrificed. In the TSC the parties stipulate that a settlement failure will not require the defendants to forego arguing against the breadth and scope of the class.

33. 7 EEOC ANN. REP. 34 (1973).

34. George Sape, Deputy Director of the Office of Congressional Affairs of the EEOC, and Thomas Hart, professional staff member of the House Subcommittee on Labor, have argued that Congress preserved the individual right to sue because of its conviction that aggressive individual litigants would contribute to developing the law under the new statute. Sape & Hart, *supra* note 15, at 879-80.

35. West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1085-86 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971); Florida Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960). *See* note 41 *infra* and accompanying text.

36. West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710, 740 (S.D.N.Y. 1970), *aff'd.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

37. *See, e.g.*, Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

38. *See* note 10 *supra* and accompanying text.

39. *See* note 30 *supra* and accompanying text.

40. *See* note 14 *supra* and accompanying text.

41. *See* Zerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151, 159 (S.D.N.Y. 1971): "[A] bird in the hand is to be preferred to the flock in the bush and a poor settle-

A fundamental tension, however, will exist between the original plaintiffs and the interests of those they purportedly represent. The original plaintiffs, who would retain control of the suit, may be willing to compromise the interests of the class as a whole, either because of a legitimate belief that others' rights to redress are uncertain or because the controlling plaintiffs are operating solely in their own interest. However, similar dangers are present whenever a class action is settled. Rule 23 of the Federal Rules of Civil Procedure was designed to protect against such dangers by requiring close judicial supervision of settlement agreements in class action suits. Arguably, the broad nature of the TSC aggravates the potential for abuse and makes the protective provisions of rule 23 inadequate. The questions thus arise: Does the tentative settlement class concept fall within the settlement procedures permitted by the rule, and, if so, does the rule offer sufficient protection against potential abuse?

The answer to the first question depends upon whether the TSC meets the requirements for a class action prescribed by rule 23(a) and whether it falls within one of the several categories for the maintenance of class actions established by rule 23(b).

Judicial construction of rule 23(a) has imposed the preliminary requirement that there in fact be a "class."[42] Class existence is a question of fact to be determined according to the circumstances of each case.[43] Although it may be said that discrimination by its nature is an injury to a class of persons,[44] the courts will not certify a group as a class unless it can be described with precision sufficient to allow the court administratively to determine whether a given individual is a member.[45] A court has broad discretion in defining a class, however.[46] If the plaintiffs' definition is unacceptable the court may either reconstrue the complaint or redefine the class to permit the class

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ment to a good litigation." *See also* Fox, *Settlement: Helping Lawyers Fulfill Their Responsibility*, 53 F.R.D. 129-30 (1971).

42. 7 C. Wright & A. Miller, Federal Practice and Procedure § 1760, at 579 (1972).

43. 7 C. Wright & A. Miller, *supra* note 42, § 1760, at 579, citing Chaffee v. Johnson, 229 F. Supp. 445 (S.D. Miss. 1964), *affd. on other grounds*, 352 F.2d 514 (5th Cir 1965), *cert. denied*, 384 U.S. 956 (1966).

44. *Cf.* Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966): "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class."

45. *See* DeBremaecker v. Short, 433 F.2d 733 (5th Cir. 1970) (class action on behalf of the "residents of this state" active in the "peace movement" complaining of harassment by members of the city police department dismissed because of indefiniteness of the plaintiff class). *See also* Lopez Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969) (task of applying class definitional factors to each state resident held to be infeasible).

46. City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

action to proceed,[47] or it can allow the plaintiff to limit the class by amending his complaint.[48]

Assuming that an appropriate class may be defined, the TSC must meet the four prerequisites of rule 23(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

There should be little problem meeting the first two requirements. The broad scope of the tentative settlement class, which may include all parties aggrieved or who may be aggrieved in the future by the defendant's past conduct, should make joinder of all members "impracticable."[49] A variety of factors, however, such as the nature of the action, the size of the individual claims, and the location of the members of the class may influence the resolution of this issue in a particular case.[50]

The second requirement—that there be "questions of law or fact common to the class"—will be met because the discriminatory character of the defendant's conduct will be a common issue, even though individual class members may have suffered different effects from the alleged discrimination and different groups may have adverse interests in obtaining a settlement.[51]

There may be more difficulty satisfying the requirements of rules 23(a)(3) and (a)(4) because of the breadth of the tentative class.[52] Rule 23(a)(3) provides that "the claims or defenses of the representative parties must be typical of the claims or defenses of the class." This has been interpreted as requiring that the representative's in-

47. Dolgow v. Anderson, 43 F.R.D. 472, 492 (E.D.N.Y. 1968), *revd. on other grounds*, 438 F.2d 825 (2d Cir. 1970).

48. *Cf.* FED. R. CIV. P. 23(d)(4).

49. *But see* Tolbert v. Western Elec. Co., 5 CCH EMPL. PRAC. DEC. ¶ 7989 (N.D. Ga. 1972); Chavez v. Rust Tractor Co., 2 CCH EMPL. PRAC. DEC. ¶ 10,171 (D.N.M. 1969).

50. 7 C. WRIGHT & A. MILLER, *supra* note 42, § 1762, at 600.

51. Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966); 7 C. WRIGHT & A. MILLER, *supra* note 42, § 1763, at 608. *See also* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969); Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 189 (E.D. La. 1968); Washington v. Lee, 263 F. Supp. 327, 329-30 (M.D. Ala. 1966), *affd. per curiam*, 390 U.S. 333 (1968).

The requirement of rule 23(a)(2) has been held superfluous because of a similar requirement under rule 23(b). Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 340 n.9 (D. Minn. 1971); 3B J. MOORE, *supra* note 19, ¶ 23.06-1, at 23-301. Most courts do not expend much energy determining whether it is satisfied. 7 C. WRIGHT & A. MILLER, *supra* note 42, § 1763, at 604.

52. *See* Harvey v. International Harvester Co., 56 F.R.D. 47, 48 (N.D. Cal. 1972).

terest not conflict with the interests of those he claims to represent.[53] The full meaning of this provision is put into perspective when viewed together with the final requirement of rule 23(a),[54] which mandates that "[t]he representative parties . . . fairly and adequately protect the interests of the class." The use of the word "protect" is significant; the binding effect of a judgment foreclosing rights of absentee parties imposes a heavy responsibility on the court and on the class representative.[55] Whether representative parties adequately protect the nonparty plaintiffs is a factual issue to be disposed of by the trial court.[56]

The unique nature of the tentative settlement class makes adequacy of representation troublesome. The *Manual for Complex Litigation* lists several reasons why tentative settlement classes contravene the policy of rule 23.[57] The criticisms suggest that the controlling plaintiffs are unable adequately to serve the interests of the remainder of the class; also, the effort required to ensure that the class is equitably composed frustrates the goal of speedy settlement: "[A]ppropriate membership of the class and the identity of the members cannot be determined in the absence of an opportunity for hearing and judicial findings of fact and conclusions of law. Nor can there be any assurance that the tentative class will be composed of interests which are not conflicting."[58] In addition, the question of representation is complicated by the fact that those involved in the unofficially negotiated formation of the tentative class are self-appointed.[59] As the court noted in *Ace Heating & Plumbing Co. v. Crane Co.*, ". . . when the settlement is not negotiated by a court-designated class representative the court must be *doubly careful* in evaluating the fairness of the settlement to plaintiff's class."[60]

53. Rakes v. Coleman, 318 F. Supp. 181, 190 (E.D. Va. 1970); C. WRIGHT, FEDERAL COURTS § 72, at 307 n.14 (2d ed. 1970); Doneland, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. IND. & COM. L. REV. 527, 534 (1969).

54. Doneland, *supra* note 53, at 534.

55. Dolgow v. Anderson, 43 F.R.D. 472, 493 (E.D.N.Y. 1968), *revd. on other grounds*, 438 F.2d 825 (2d Cir. 1970): "[The nonparty members] may find themselves bound even though they were not actually aware of the proceeding. In such circumstances, the contention that adequate representation is lacking becomes weighty and the 'interests of the affected persons must be carefully scrutinized to assure due process of law for the absent members,'" *quoting* Carroll v. American Fed. of Musicians, 372 F.2d 155, 162 (2d Cir. 1967), *vacated*, 391 U.S. 99 (1968).

56. Flaherty v. McDonald, 178 F. Supp. 544, 551 (S.D. Cal. 1959).

57. MANUAL FOR COMPLEX LITIGATION (pt. 1) § 1.46 at 43-45 (West ed. 1973) [hereinafter MANUAL]. The *Manual* is published under the auspices of the Federal Judicial Center, and has a Board of Editors composed of federal judges. *Id.* at iii-xiv. The Federal Judicial Center was established by Congress in 1967 to improve federal judicial administration through research and planning; the Center must regularly report to the Judicial Conference of the United States. 28 U.S.C. §§ 620-29 (1970).

58. MANUAL, *supra* note 57, § 1.46, at 43-44.

59. MANUAL, *supra* note 57, § 1.46, at 44.

60. 453 F.2d 30, 33 (3d Cir. 1971) (emphasis added).

In determining whether there is adequate representation as required under rules 23(a)(3) and (a)(4), one commentator suggests that a court consider (1) whether the interests of the named parties are coextensive with the interests of the other members of the class; (2) whether their interests are antagonistic in any way to the interests of those whom they represent; (3) the proportion of those named compared to the total membership of the class; and (4) any other facts that might be relevant to deciding the question.[61]

The first two factors may have identical meanings.[62] The former has been seen as embodying the requirement of typicality of claims of rule 23(a)(3),[63] and some courts feel that typicality simply paraphrases the requirement that the representative not have interests that conflict with those of the class.[64] In any event, these requirements do not mean that the interests of the representatives must be identical to those of each member of the class. The representatives simply must share common objectives and legal or factual positions.[65] Settlement class members would have common interests in ending employment discrimination and receiving redress for injuries, so it may be argued that these requirements are met.[66] Still, the establishment of an affirmative action hiring quota, for example, may benefit one group at the expense of another, particularly if the party plaintiffs are all of one ethnic group and the nonparty plaintiffs of another. The settlement might not only compromise the latter's interests but foreclose any later pursuit of relief. In an analogous case[67] a court found that the class representatives' motive for commencing the action—obtaining rescission of a contract—made them less likely to accept a cash settlement that would be in the best interest of the nonparty class members; thus representation was held inadequate.

Settlement is a preferred means of disposition, however, and a federal judge has an affirmative duty to advance a case to a just, inexpensive, and expeditious resolution.[68] The alternatives of increased

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61. 3B J. MOORE, *supra* note 19, ¶ 23.07(1), at 23-352-53.

62. The courts have often merged these factors, even though they are analytically separable. *See, e.g.*, Dolgow v. Anderson, 43 F.R.D. 472, 493, 495 (E.D.N.Y. 1968), *revd. on other grounds*, 438 F.2d 825 (2d Cir. 1970).

63. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968) (*Eisen II*); Rosado v. Wyman, 322 F. Supp. 1173 (S.D.N.Y.), *affd. on other grounds*, 437 F.2d 619 (2d Cir.), *cert. denied*, 397 U.S. 397 (1970).

64. *See* note 53 *supra* and accompanying text.

65. 7 C. WRIGHT & A. MILLER, *supra* note 42, § 1769, at 654-55.

66. *Cf.* Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971) (former employee could bring action under title VII as class representative; fact that he was no longer employed made him a better class representative since he was both acquainted with the defendant's practices and free from coercive influence of company management).

67. Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273 (S.D.N.Y. 1970).

68. Fox, *supra* note 41, at 132, 134.

judicial scrutiny and procedural safeguards therefore should be examined before the tentative settlement class concept is condemned.

The flexibility required for the institution of practical safeguards is provided by rule 23(d) of the Federal Rules of Civil Procedure, under which a

> court may make appropriate orders . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

Under this rule the court could hold an evidentiary hearing prior to the submission of notice to the tentative class on the adequacy of representation;[69] if the representation is not adequate the class could be restructured.[70] Alternatively, the hearing could be held prior to the final approval of the settlement, and if the court is not satisfied that representation is adequate it could stay approval of the settlement and allow an adjustment of the class representatives to ensure protection of nonparty class members.[71]

Perhaps the prerequisites of rule 23(a) can be satisfied by erecting procedural safeguards. A case must also fall within one of the three categories established by rule 23(b), however, to be maintained as a class action. The second and third categories are potentially relevant to civil rights litigation. Under rule 23(b)(2) the party opposing the class must have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Under rule 23(b)(3) the court must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Although class actions dealing with civil rights could be maintained under rule 23 prior to its redrafting in 1966,[72] there is evi-

69. *See* MANUAL, *supra* note 57, § 1.46, at 43.

70. *See* notes 46-48 *supra* and accompanying text.

71. Basch v. Talley Indus., Inc., 53 F.R.D. 14 (S.D.N.Y. 1971); Cahn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1216 (1966).

72. *See, e.g.*, Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Todd v. Joint Apprenticeship Comm. of the Steel Workers of Chicago, 223 F. Supp. 12, 16 (N.D. Ill. 1963),

dence that section (b)(2) was added to the rule primarily to facilitate the maintenance of antidiscrimination suits.[73] The *1966 Advisory Committee's Note to Revised Rule 23* construes section (b)(2) as encompassing actions in which a party is charged with unlawful discrimination against a class whose members are incapable of specific enumeration.[74] One court asserted that the Committee clearly "envisioned the (b)(2) class action as the preferred procedural device for disposing of 'civil rights' cases . . . ."[75] Rule 23(b)(2) has been the foundation for a great number of civil rights actions alleging race[76] and sex[77] discrimination, as well as the vehicle for many school[78] and housing[79] desegregation suits.[80]

Section (b)(2), however, is limited to situations in which the final relief sought is exclusively or predominantly injunctive or declaratory.[81] Thus, a suit seeking mainly monetary damages does not qualify under that portion of the rule.[82] Whether title VII tentative settlement class actions fall within rule 23(b)(2) is a difficult question. The statute authorizes courts to grant injunctions and to "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees . . . with . . . back pay . . . ."[83] The court initially determines whether there has been unlawful dis-

vacated as moot, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); 7A C. WRIGHT & A. MILLER, *supra* note 42, § 1776, at 32-35 n.64-67.

73. Cahn, *supra* note 71, at 1216: "Subsection (b)(2) is new. It will place into the rule procedures now used in class actions brought to force or prevent action that really concerns members of a class individually—cases concerning racial discrimination . . . come immediately to mind."

74. *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 102 (1966).

75. Johnson v. City of Baton Rouge, 50 F.R.D. 295, 300-01 (E.D. La. 1970).

76. *See, e.g.*, Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).

77. *See, e.g.*, Laffey v. Northwest Airlines, Inc., 321 F. Supp. 1041 (D.D.C. 1971).

78. *See, e.g.*, Louisiana High School Athletic Assn. v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968).

79. *See, e.g.*, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 n.42 (2d Cir. 1968).

80. There have also been a number of class actions since 1966 involving civil rights litigation that have not been categorized in any of the three categories in subdivision (b). *See, e.g.*, Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971); Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd.*, 472 F.2d 631 (9th Cir. 1972); Wilson v. Monsanto Co., 315 F. Supp. 977 (E.D. La. 1970); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970).

Some courts have allowed civil rights class actions under rule 23(b)(3). *See, e.g.*, Mack v. General Elec. Co., 329 F. Supp. 72, 76 (E.D. Pa. 1971); Baxter v. Savannah Sugar Ref. Corp., 46 F.R.D. 56 (S.D. Ga. 1968); Hayes v. Seaboard Coast Line R.R. Co., 46 F.R.D. 49 (S.D. Ga. 1968); Hardy v. U.S. Steel Corp., 289 F. Supp. 200 (N.D. Ala. 1967).

81. 3B J. MOORE, *supra* note 19, ¶ 23.45(1) at 23-708; *Amendments to Rules of Civil Procedure*, *supra* note 74, at 102.

82. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804 (U.S. May 28, 1974) (*Eisen III*); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (*Eisen II*).

83. 42 U.S.C. § 2000e-5(g) (Supp. II, 1972).

crimination, and, if discrimination is found, an injunction is entered and claims for monetary relief are litigated separately.[84] Professor Moore suggests that the court divide such a case and handle claims for relief under separate sections of rule 23(b).[85] Others argue that the entire action should be allowed to proceed under section (b)(2) if injunctive relief is sought, urging that a dispute over whether an action is primarily for injunctive or declaratory relief rather than a monetary award is a useless expenditure of energy.[86] Courts have generally allowed title VII suits to proceed under section (b)(2).

Title VII tentative settlement class actions should also be valid under rule 23(b)(3). The drafters created section (b)(3) as a broad residual category to cover cases in which factors of convenience and efficiency mandate the use of the class action: "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[87] The major advantage of a TSC—its ability to encourage and expedite settlement[88]—probably makes it "superior to other available methods for the fair and efficient adjudication of the controversy," as rule 23(b)(3) requires.

A TSC action under title VII thus falls within rule 23(b)(2) as a civil rights action asking for injunctive or declaratory relief and within rule 23(b)(3) as an action offering convenience and finality. Section (b)(2) is normally preferred when both (b)(2) and (b)(3) may be used. Under (b)(3), members of the class may exclude themselves from the proceeding, and thereby avoid being bound by a judgment against the remaining members of the class;[89] no such option exists

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84. *See, e.g.*, Jamison v. Olga Coal Co., 335 F. Supp. 454 (S.D. W. Va. 1971) (race discrimination); Laffey v. Northwest Airlines, Inc., 321 F. Supp. 1041 (D.D.C. 1971) (sex discrimination); Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970), *aff'd. in part, revd. in part on other grounds*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1007 (1972). *See also* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).

85. 3B J. MOORE, *supra* note 19, ¶ 23.45(1), at 23-708-09.

86. 7A C. WRIGHT & A. MILLER, *supra* note 42, § 1775, at 23.

87. 3B J. MOORE, *supra* note 19, ¶ 23.45(1), at 23-710.

88. *See* text following note 27 *supra*.

89. Van Gemert v. Boeing Co., 259 F. Supp. 125, 130 (S.D.N.Y. 1966). FED. R. CIV. P. 23(c)(2) directs that notice be given to members of a (b)(3) class advising each member that he may exclude himself from the class.

The plumbing fixture cases (*see* text accompanying notes 1-5 *supra*), employing a tentative settlement class, were held to be within the provisions of (b)(3). Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 373 (E.D. Pa. 1970). Although the court never specifically categorized the action, the grant of the right to opt out of the plaintiff class indicates a (b)(3) action. The plumbing fixture cases, however, were private treble damage antitrust actions, which are normally brought under (b)(3). 3B J. MOORE, *supra* note 19, ¶ 23.45(2), at 23-758-59. Nevertheless, it can be argued that the tentative settlement class concept itself is well suited to the justifications of (b)(3).

under (b)(2).[90] It is feared that allowing a suit qualifying under both (b)(2) and (b)(3) to be considered a (b)(3) action "would permit the institution of a separate litigation, thus unduly burdening the judicial system"[91] and defeating the policy of rules 23(b)(1) and (b)(2).[92]

The tendency of tentative settlement classes to be exceptionally broad, however, may justify allowing the use of section (b)(3)'s opting out provision. The question of adequate representation[93] is less troublesome if individual plaintiffs are allowed to withdraw from the settlement class after receiving notice. Thus, unless fair representation can be guaranteed by court supervision, perhaps the TSC action should be categorized under section (b)(3).

The disadvantage of allowing the use of the opt out provision of rule 23(b)(3) is that withdrawals may significantly diminish the employer-defendant's incentive for initiating TSC negotiations; the resulting settlement might not entirely resolve all present and future claims based on the defendant's past conduct. It may be, however, that in most actions withdrawals would be few, and the employer-defendant would remain with a settlement incentive. Also, a court that finds that all class members are adequately represented or that withdrawals would be numerous probably could decide to rely on section (b)(2) instead of (b)(3), and prohibit withdrawals.

Since the creation of a tentative settlement class postpones a final class determination until court approval of the settlement, the question arises whether such a delay is permissible under rule 23 (c)(1), which provides, in part: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

The legislative history of the phrase "as soon as practicable," like the phrase itself, is ambiguous. It can be argued that the draftsmen of rule 23 did not intend to require a class determination immediately after suit is filed. The 1964 *Preliminary Draft of the Proposed Amendments to Rules of Civil Procedure for the United States District Courts* stated that whether a class action may be maintained must be determined "[a]s soon as practicable . . . *and before the decision on the merits* . . . ."[94] Perhaps the decision to delete the latter phrase in the final draft[95] should be interpreted as requiring a more

90. FED. R. CIV. P. 23(c)(3).

91. Van Gemert v. Boeing Co., 259 F. Supp. 125, 130 (S.D.N.Y. 1966).

92. Van Gemert v. Boeing Co., 259 F. Supp. 125, 130-31 (S.D.N.Y. 1966); 3B J. MOORE, *supra* note 19, ¶ 21.31(3).

93. *See* text accompanying notes 57-67 *supra*.

94. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 34 F.R.D. 325, 386 (1964) (emphasis added).

95. On March 12, 1965, the Committee on Federal Rules of Civil Procedure of the Judicial Conference of the Ninth Circuit rejected a preliminary draft of the proposed rules that contained the phrase "before the decision on the merits." Committee

expedient determination. However, one commentator argues that the elimination of the phrase was intended to allow courts *greater* latitude, giving them authority to grant class relief even after a decision on the merits in an individual suit.[96] Under this reading the delay in class determination necessitated by the creation of a tentative settlement class would certainly be permissible.

Furthermore, the last sentence in rule 23(c)(1), which states that "an order under this subdivision may be conditional, and may be altered or amended before the decision on the merits," indicates that later reconsideration or alteration of class determination is clearly permissible.[97] As one district court noted, a decision regarding class determination "is not irreversible; should any new matter arise which suggest [*sic*] the need to reconsider [such a] decision, the Court will not hesitate to utilize its power under Rule 23(c)(1)."[98]

One court, however, has stated that "as soon as practicable" contemplates determination of class action status promptly after the filing of an action,[99] and another court has observed that current practice calls for the determination of the maintainability of a class action and the structuring and identification of the class to be made "at the earliest pragmatically wise moment."[100] One commentator notes that by local court rule some districts require determination to be made within sixty or ninety days of the filing of the complaint.[101]

The *Manual for Complex Litigation* states that there are sound and urgent practical considerations that call for early class determination.[102] Persons who think that they are represented in a proposed class action may fail to make a claim for relief until the statute of limitations has run:[103] "[M]embers of a putative plaintiff class may be

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on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Supplemental Report*, 37 F.R.D. 71, 71 (1965). On June 21, 1965, the Committee again rejected the preliminary draft but noted certain improvements over the draft of March 12, including the deletion of the phrase. Committee on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Second Supplemental Report*, 37 F.R.D. 499, 500, 522 (1965).

96. Note, *Title VII and Postjudgment Class Actions*, 47 IND. L.J. 350 (1972).

97. *See, e.g.*, Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98, 105 (D. Colo. 1971); Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022, 1026 (E.D. Pa. 1970).

98. Weisman v. MCA Inc., 45 F.R.D. 258, 265 (D. Del. 1968).

99. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967). In that case, however, counsel for the defendants requested leave to file affidavits and briefs, requested additional discovery, and sought to prevent oral argument before the class determination; the court viewed the question as likely to remain open for at least two or three additional months. 42 F.R.D. at 325.

100. Berman v. Narragansett Racing Assn., 48 F.R.D. 333, 336 (D.R.I. 1969).

101. Dobbin, *Settlement of Private Antitrust Litigation Including Class Type Actions and Multiple Defendant Lawsuits*, 34 OHIO ST. L.J. 513, 520 (1973).

102. MANUAL, *supra* note 57, § 1.40, at 18.

103. MANUAL, *supra* note 57, § 1.40, at 18-19.

led by the very existence of the lawsuit to neglect their rights until after a negative ruling on [the existence of a class action]—by which time it may be too late for the filing of independent actions."[104]

The problem is especially troublesome with regard to the TSC. The initial attempt to represent an unusually broad class of plaintiffs, the increased delay in class determination, and the possibility that the court will not approve the compromise—thereby necessitating a de novo determination of the proper class—magnify the danger that some plaintiffs will be excluded from the class after the statute of limitations has expired.

There are three methods of ameliorating the problem. First, one federal judge has suggested that in cases in which the court denies the existence of a class action subsequent to the expiration of an applicable statute of limitations, the denial may, under the provision of rule 23(c) permitting conditional orders, be conditioned on the tolling of the statute for passive members of the disbanded class.[105] The propriety of such an action is not settled,[106] however, and one court has argued that the retroactive tolling of the statute of limitations should depend upon the reason for the dismissal of the class action allegation.[107] A better solution would be for the court to condition initial approval of a TSC upon the inclusion of a term in the agreement that binds the defendants to waive the statute of limitations in the event that the settlement is not consummated.[108]

The doctrine of equitable estoppel presents a second method of protecting the plaintiff. It has been held that a defendant is estopped

104. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 40 (1967).

105. MANUAL, *supra* note 57, § 1.40, at 19 n.21.

106. 7A C. WRIGHT & A. MILLER, *supra* note 42, § 1795, at 222: "However, it is not at all settled that a negative determination of the class action question should relate back [for purposes of the statute of limitations]."

107. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 461 (E.D. Pa. 1968):

> If the reason for the negative determination is *failure* to meet the prerequisites of 23(a) or even if the reason is that the common questions do not predominate over individual questions under 23(b)(3) it would seem reasonable to conclude that such negative determination also relates back to the filing of the complaint. If there never really was a class to be represented, members of the purported class can scarcely be heard to claim that they started suit, vicariously, before the limitations period expired. But if the reason for the negative determination stems from a weighing of various considerations of judicial housekeeping, it may well be that the decision should not relate back to the commencement of the action, and that at the very least, an opportunity should be presented for proof of reliance upon the pendency of the purported class action sufficient to toll the statute of limitations. Any other approach would make it virtually mandatory for every class member to file a cautionary separate action within the limitations period.

108. Authority for conditional class determination orders is vested in the courts by FED. R. CIV. P. 23(c)(1), and it is well established that, in the absence of statutory prohibition, the statute of limitations defense may be waived. *See, e.g.*, Allen v. Smith, 129 U.S. 465 (1889); Finn v. United States, 123 U.S. 227 (1887); *In re* Smith's Estate, 240 Iowa 499, 505, 36 N.W.2d 815, 825 (1949).

from resorting to a plea of limitations if the plaintiff was led not to sue by the defendant's own actions.[109] Generally the type of conduct that is sufficient to give rise to an estoppel raises a question of fact;[110] the defendant must have done something that affirmatively induced the plaintiff to delay his action.[111] Deception or bad faith is involved in the usual case,[112] but the unique status of the TSC arguably justifies extending the doctrine. The TSC action would probably be initiated by the employer-defendant. The initiation of suit and the defendant's subsequent negotiations might be affirmative acts that lull the plaintiff into a sense of security and cause him to forego filing suit. Moreover, the purpose of the statute of limitations will not be subverted by tolling its application in the TSC case. Limitation statutes are primarily designed to promote justice by preventing the surprise that may occur when claims are suddenly revived by dilatory plaintiffs long after pertinent "evidence has been lost, memories have faded, and witnesses have disappeared."[113] Surprise is not a factor in TSC cases, however. An action based on the conduct in controversy will have been instituted before the period of limitations expires. Defendants are thus made aware of the nature of the evidence that will be needed at trial, and, since the action is brought on behalf of all others similarly situated, the defendants have notice of the extent to which there are claims against them. The equities thus call for the application of the estoppel doctrine.

The third method of dealing with the problem is to ignore it. An examination of the judicial attitude toward class actions in the employment discrimination area reveals that some courts show little concern for the protection of the interests of absentee class members who are ultimately excluded after the statute of limitations has run. The limitations problem may simply be insufficient to require early determination of the class.

For example, in *Curry v. La-Z-Boy South, Inc.*,[114] the court specifically postponed defining the class in order to see how the plaintiff would develop her class at an evidentiary hearing. Although the statute of limitations problem was present the court ignored it and

109. *See, e.g.*, State v. Hart Motor Express, Inc., 270 Minn. 24, 29, 132 N.W.2d 391, 394 (1964); Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 107, 207 A.2d 513, 519 (1965).

110. *See, e.g.*, Staats v. Rural Mut. Cas. Ins. Co., 271 Wis. 543, 545, 74 N.W.2d 152, 154 (1956).

111. *See, e.g.*, Safeway Stores, Inc., v. Wilson, 190 Kan. 7, 11, 372 P.2d 551, 554 (1962).

112. *See, e.g.*, Industrial Indem. Co. v. Industrial Accident Comm., 115 Cal. App. 2d 684, 687, 252 P.2d 649, 651 (1953); Safeway Stores, Inc. v. Wilson, 190 Kan. 7, 12, 372 P.2d 551, 555 (1962).

113. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

114. 4 CCH EMPL. PRAC. DEC. ¶ 7734 (S.D. Miss. 1972).

dealt primarily with standing and scope of representation as opposed to the timing of class determination.[115] Similarly, the court in *Wilson v. Monsanto Co.*[116] ruled that the plaintiff had the right to represent all members of a general undefined class until discovery and an evidentiary hearing would permit "more precise pleadings, enabling the . . . Court to equate and balance what the [plaintiff] claims are the limits of the class against the tests of adequate representation, protection of the interests of the class, and manageability of the lawsuit."[117] Again the court ignored the possible foreclosure of the rights of persons who think they are represented as part of the class.[118]

The approach in these cases seems to be a unwritten balancing of the statute of limitations problem against the interests served by delaying class determination. The use of the tentative settlement class in title VII actions vindicates public as well as private interests; individual plaintiffs who represent class interests are "private attorney generals."[119] The interests of excluded plaintiffs may thus be outweighed by the overriding public interest in the maintenance and settlement of class action suits.

This argument, however, and indeed the entire argument for the use of the TSC, assumes that the device will lead to fair and just settlements. The basic test for judging a compromise is a comparison of the terms of the compromise with the likely rewards of litigation,[120] but this comparison is very difficult in the tentative settlement class context. There is usually little or no discovery prior to the class action determination,[121] and in the absence of information relevant to liability, damages, and the expenses of trial and preparation for trial it may be impossible to determine if the proposed compromise indeed correlates with the economic reality of the case.[122] Some argue that rights are much more likely to be protected when a court certifies the class determination by resolving necessary factual issues and analyzing important economic data before the settlement is negotiated.[123] In tentative settlement class actions a court could defer settle-

115. 4 CCH EMPL. PRAC. DEC. ¶ 7734, at 5843-44.

116. 315 F. Supp. 977 (E.D. La. 1970).

117. 315 F. Supp. at 979, *quoting* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (Godbold, J., concurring).

118. *See also* Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 373: "There is no mandatory requirement in Rule 23 that in every case the class determination must be made first before any settlement negotiations are undertaken."

119. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968).

120. MANUAL, *supra* note 57, § 1.46, at 44.

121. McGough & Lerach, *Termination of Class Action: The Judicial Rule*, 33 U. PITT. L. REV. 445, 457 (1972) (suggesting that the court could order full discovery prior to approving the settlement).

122. MANUAL, *supra* note 57, § 1.46, at 44.

123. *Id.* at 45.

ment approval until after discovery or other exchange of information was made to aid the court in defining the class and formulating the notice contemplated under rule 23(e).[124] It may be impossible for the court ever to assess the merits of a case accurately, however, and the settlement itself may best reflect the parties' evaluation of the actual merits of the case.[125]

Use of the tentative settlement class may facilitate easy, quick, and relatively inexpensive settlements of title VII suits. It may also increase the likelihood that some plaintiffs with valid claims will recover even though their proof of damage or theory of liability would not have been sufficient to justify an individual suit. However, these advantages must be balanced against the potential abuse of the technique. The TSC may encourage unwarranted claims[126] or the harassment and coercion of legitimate businesses with the threat of destructive publicity and expensive suits.[127] Furthermore, the breadth of the tentative class may make adequate class representation difficult. The advantages and disadvantages of the TSC are difficult to assess without practical experience, however. An experimental and closely supervised use of the TSC should be undertaken to ascertain its value.

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124. *See* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967).

125. Fox, *supra* note 41, at 142.

126. *See Hearings on S. 984, S. 1222, S. 1378 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-20, at 145 (1971) (testi- of Commerce).

127. *Id.* at 169-70 (testimony of Thomas Nichol, Jr., general counsel of Gas mony of Irving Scher, member of the Consumer Issues Committee of the U.S. Chamber Appliance Manufacturers Association).